STATE OF MINNESOTA

IN SUPREME COURT

A20-1048

Tax Court McKeig, J.

Jeffrey Olson,

Relator,

vs.

Filed: December 30, 2020
Office of Appellate Courts

Commissioner of Revenue,

Respondent.

Eric Johnson, Johnson Tax Law P.C., Saint Paul, Minnesota, for relator.

Keith Ellison, Attorney General, John M. O'Mahoney, Assistant Attorney General, Saint Paul, Minnesota, for respondent.

S Y L L A B U S

The Department of Revenue's notice of a tax order sent to the taxpayer by regular, non-certified, mail satisfies due process.

Affirmed.

O P I N I O N

McKEIG, Justice.

This case considers whether notice of a tax order sent by regular mail satisfies due process under the United States and Minnesota Constitutions. The Department of Revenue sent relator Jeffrey Olson a tax order assessing sales and use taxes covering a 3-year period. This tax order was sent by regular (i.e. non-certified) mail. Olson maintains that he either did not receive this order or he overlooked it and only learned about the order once the Commissioner of Revenue levied his bank account. Olson appealed the tax order to the tax court, where he asserted that regular mail provided insufficient notice and therefore violated procedural due process. The Commissioner moved to dismiss, arguing that regular mail satisfies due process under our precedent in *Turner v. Commissioner of Revenue*, 840 N.W.2d 205, 209–10 (Minn. 2013). The tax court agreed with the Commissioner and dismissed the appeal. Because we conclude that sending a tax order by regular mail provides constitutionally sufficient notice, we affirm.

FACTS

Relator Jeffrey Olson runs a farming operation and heavy construction business as a sole proprietorship. The Commissioner first sent Olson a letter on April 27, 2017, to his home address, which is also his business address, informing him that he had been selected for a sales and use tax audit. There was no response to this letter. The Commissioner then sent Olson a letter on May 19, 2017, to the same address, informing him that the Department's staff had tried multiple times to reach him by phone to schedule an appointment so that he could participate in the audit. The audit conference was scheduled

to take place in Olson's city of residence, Thief River Falls, on June 19, 2017. The Commissioner wrote to Olson again on June 30, 2017, to inform him that he had failed to appear for the conference, which was therefore rescheduled to July 17, 2017 at the same location. Olson also failed to appear at this conference.

The Commissioner then sent a preliminary audit report to Olson on July 28, 2017, showing that Olson owed $120,541.01 in unpaid sales and use taxes relating to his business. Olson again failed to respond.

The Department sent Olson a tax order by regular mail—as authorized by the Legislature, *see* Minn. Stat. § 270C.33, subd. 8 (2020)—assessing the sales and use taxes and over $30,000 in penalties and interest. Collectively, the Department asserted that Olson owed $154,779.09. The tax order had a notice date of September 6, 2017, and indicated that payment was due on November 6, 2017. Alternatively, Olson had 60 days to pursue an internal appeal of the order. The tax order was addressed and sent—as with all other correspondence from the Department—to Olson's home address, which is the same as his business address.

Olson asserts he first became aware of the tax liability in January 2018, when his bank account was levied on by the Commissioner. After an unsuccessful courtesy review within the Department, Olson appealed to the tax court from the September 6 tax order. In his amended notice of appeal, Olson alleged that there was no regular audit, that he did not actually receive any mailings from the Commissioner, and he disputed all amounts assessed by the Commissioner. He told the tax court that he "receive[s] a substantial amount of

'junk mail' at [his] house" that "tends to 'pile up' on the kitchen table." Olson had "no record or knowledge" that he received the Commissioner's tax order.

The Commissioner filed a motion to dismiss for lack of subject matter jurisdiction, asserting that Olson's appeal was untimely. *See* Minn. Stat. § 271.06, subd. 2 (2020) (requiring that an appeal of a tax order must be filed within 60 days of the notice date of the order). Based on the September 6 notice date, Olson's appeal was due November 5, 2017, but he did not file it until over two years later, on December 23, 2019. The Commissioner also maintained that Olson's claim—that he did not receive the tax order—was irrelevant, because the Commissioner properly sent all correspondence by regular mail to his last known address. In response to the motion to dismiss, Olson argued that the tax order was not mailed on the date claimed and that regular mailing alone was insufficient notice to satisfy due process.

The tax court allowed Olson to file an amended notice of appeal so that he could raise his constitutional claims. In addition to asserting the constitutional claim, Olson further declared that he "would not have been able to pay off the taxes at issue in this case in full, without substantial personal and business hardship."

The tax court granted the Commissioner's motion to dismiss, concluding that Olson's appeal was untimely. *Olson v. Comm'r of Revenue*, No. 9376-R, 2020 WL 3455828, at *6 (Minn. T.C. June 15, 2020). Olson then appealed to us by writ of certiorari. *See* Minn. Stat. § 271.10 (2020).

ANALYSIS

The Legislature authorized the Commissioner to notify taxpayers of a tax assessment by mail, "postage prepaid." Minn. Stat. § 270C.33, subd. 8. Olson asserts that regular, non-certified, mail service provides insufficient notice of a tax liability and therefore violates due process. The Commissioner responds that regular mail, which is authorized by statute, provides sufficient notice to satisfy due process.[1]

We review "orders of the tax court to determine whether the tax court lacked jurisdiction, whether its decision was not justified by the evidence or did not conform to the law, and whether the tax court otherwise committed an error of law." *Turner*, 840 N.W.2d at 207; *see* Minn. Stat. § 271.10, subd. 1 (2020). We review the tax court's factual findings for clear error and its conclusions of law, including constitutional determinations, de novo. *Id.* at 207–08.

The Due Process Clauses of the United States and Minnesota Constitutions provide that the government cannot deprive a person of "life, liberty, or property without due process of law." *Boutin v. LaFleur*, 591 N.W.2d 711, 716 (Minn. 1999) (quoting U.S. Const. amends. V, XIV; Minn. Const. art. I, § 7). But "[d]ue process does not require that a property owner receive *actual* notice before the government may take [their] property." *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (emphasis added). Instead, notice is constitutionally sufficient if it is "reasonably calculated, under all the circumstances, to

[1] Olson effectively asks us to hold that section 270C.33, subdivision 8, which permits the use of regular mail for a tax order, is unconstitutional. "We presume that statutes are constitutional and hold the party asserting otherwise to a high burden to overcome that presumption." *Fielding v. Comm'r of Revenue*, 916 N.W.2d 323, 328 (Minn. 2018).

apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). For example, "regular mailing alone would normally satisfy the requirements of due process." *Turner*, 840 N.W.2d at 210. If the State, however, has actual knowledge that its initial notice to the taxpayer has failed to reach the taxpayer, due process requires that the State take additional reasonable steps to attempt to provide notice if it is practicable to do so. *Jones*, 547 U.S. at 227–31; *see also Robinson v. Hanrahan*, 409 U.S. 38, 38–40 (1972) (holding that when state had actual knowledge that vehicle owner was in jail, it could not initiate vehicle forfeiture proceedings by mailing notice to his home address).

Olson contends that regular mail notice is insufficient because a better alternative exists (certified mail) and the amount at issue (over $150,000) warrants more sophisticated notice procedures. Olson admits he may have "overlooked" the tax order, but maintains that his inability to dispute the underlying tax assessment—because he did not contest the tax order in 60 days—requires more effective notice of the tax order. Olson argues that the glut of junk mail in modern times means that "most people no longer monitor the mail for important notices the way they once did." He points us to several cases holding certified mail to be constitutionally sufficient. *See, e.g.*, *Dusenbery v. United States,* 534 U.S. 161 (2002). Olson also suggests that federal tax law, which generally requires certified mail, is evidence that Minnesota's procedures are deficient. He further maintains that our language commenting on the sufficiency of regular mail in *Turner* was dicta.

The Commissioner responds first by noting that Olson received numerous letters and phone calls regarding his audit, none of which he responded to, and then cites *Mullane*,

339 U.S. at 319, in which the United States Supreme Court held regular mail to be sufficient notice. The Commissioner responds to Olson's alleged inability to dispute the tax assessment by noting that he had over 3 years from the date of the assessment to file a refund claim. *See* Minn. Stat. § 289A.40 (2020).[2] The Commissioner also points out that the cases cited by Olson found that certified mail was *sufficient* notice, but not that it was *necessary* notice. Ultimately, the Commissioner asserts, it was Olson's responsibility to monitor his mail.

As an initial matter, Olson is correct that *Turner* does not necessarily control this case. In *Turner*, notice of a tax assessment was sent by both email and regular mail to Turner, who was living abroad at the time. 840 N.W.2d at 210. We stated that both forms were "entirely reasonable in context." *Id.* The context was that Turner was in regular contact with the Department by email while living abroad, and that his wife was living at their home in Minnesota at the time. We also noted that regular mail would "normally" satisfy due process, which left open the possibility of scenarios when some other form of notice may be required. *Id.* Accordingly, because our statement on regular mail did not foreclose all possible factual circumstances, *Turner* does not preclude Olson's constitutional challenge.

On the facts before us, however, the Commissioner is nevertheless correct that notice by regular mail was constitutionally sufficient here. Setting aside Olson's concession that he may have received the September 6 notice and overlooked it, his

[2] This provision would require Olson to pay the full assessment, then file a "claim for a refund of an overpayment." Minn. Stat. § 289A.40, subd. 1.

arguments appear focused on why certified mail is a better policy choice, not why regular mail is a constitutionally deficient choice. We also agree with the Commissioner that the cases cited by Olson holding that certified mail was sufficient do not mean that certified mail was required. In fact, the United States Supreme Court has observed that certified mail may be *less likely* to provide notice than regular mail because certified mail "cannot be left like regular mail to be examined at the end of the day, and it can only be retrieved from the post office for a specified period of time." *Jones*, 547 U.S. at 235.

Olson does not assert, nor is there any evidence to suggest, that the Commissioner knew Olson had not received notice of his tax liability. None of the letters sent by the Commissioner to Olson were returned as undeliverable, and he lived at the address to which each letter was sent. And aside from general statements in his brief about complications arising from pervasive junk mail, Olson provides no evidence that regular mail is not "reasonably calculated" to reach the address and person to which it is sent. *See Mullane*, 339 U.S. at 318. Nor does Olson cite any persuasive authority that holds that regular mail is insufficient notice.

To the contrary, persuasive authority has held that regular mail provides sufficient notice to, for example, property owners. *See, e.g.*, *Roslyn Jane Holdings, LLC v. Jefferson*, 42 N.Y.S.3d 61, 63 (N.Y. App. Div. 2016) ("Since the first class mailing addressed to the petitioner was not returned, there was no reason for L & L to believe that notice had not been received."); *cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (holding that regular mail notice to opt out of class action satisfied due process).

Although *Turner* does not preclude every possible due process challenge to the use of regular mail, on the facts before us, Olson's notice was constitutionally sufficient. His arguments in favor of certified mail are better suited for the Legislature.

CONCLUSION

For the foregoing reasons, we affirm the decision of the tax court.

Affirmed.